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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTHERN CALIFORNIA

EL CENTRO DIVISION

LI, Rong Dong, Plaintiff, vs. AKAL SECURITY, INC., and JOHN DOE ONE, an individual, JOHN DOE TWO, an individual, and DOES 1 - 100, Defendants	)	Case No.: 10CV2465 LAB BGS RESPONSE IN OPPOSITION TO DEFENDANT AKAL SECURITY INC.'S MOTION TO DISMISS, MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION Date: February 14, 2011 Time: 11:15 AM Dept: Courtroom 9 Judge: Hon. Larry Alan Burns

PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Plaintiff Rong Dong Li (hereinafter "Li" or "Plaintiff") opposes the motion ("Motion") to dismiss his Complaint filed by Defendant Akal Security Inc. ("Defendant"). The reason for the opposition is that the Complaint has met the standards enumerated under Rule 8 (a)(2), Rule 9(b) and other relevant rules of the Federal Rule of Civil Procedure ("F.R.C.P.") and relevant case law.

The Motion should be dismissed because Plaintiff's Complaint has stated facts sufficient to constitute the causes of action.

1. The First Cause of Action for assault has stated sufficient fact to constitute a claim upon which relief can be granted.

2. The Second Cause of Action for battery is certain and has stated sufficient fact to constitute a claim upon which relief can be granted.

3. The Third Cause of Action for intentional infliction of emotional distress is certain and has stated sufficient fact to constitute a claim upon which relief can be granted.

4. The Fourth Cause of Action for negligent infliction of emotional distress is certain and has stated sufficient fact to constitute a claim upon which relief can be granted.

5. The Fifth Cause of Action for racial and national origin discrimination is certain and has stated sufficient fact to constitute a claim upon which relief can be granted.

Should the Court find any merits with Defendants' Motion, Plaintiff respectfully requests that the Court allows him a reasonable opportunity to amend his Complaint.

Dated: January 9, 2011

Respectfully submitted,

INTER-PACIFIC LAW GROUP INC.

_______*/s/ Arthur J. Liu*_______
ARTHUR J. LIU,
Attorney for Plaintiff Rong Dong Li

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MEMORANDUM OF POINTS AND AUTHORITIES

"A pleading which sets forth a claim for relief must contain:

(2) a short and plain statement of the claim showing that the pleader is entitled to relief." F.R. C. P 8(a)(2).

A "complaint requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atlantic Corp. V. Twombly, 550 U.S. 544, 555 (2007).*

In determining whether a complaint fails to state a claim upon which relief may be granted, generally a court "must accept as true all of the factual allegations contained in the complaint," *Rickson v. Pardus*, 551 U.S. 89 (2007).

"Unless an original complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion, irrespective of whether leave to amend is requested." *King v. Mortimer*, 83 CA 2d 153 (1981).

A. There Are Sufficient Allegations in the Complaint to Support the First and Second Causes of Action for Assault and Battery.

Paragraphs 8 through 15 laid out the facts of the matter in particular why Defendant is liable for the assault and battery. While Plaintiff could have added the security guard as a defendant and alleged more facts showing liability on the part of the Defendant as a respondeat superior, the complaint as it is currently drafted is clear as to why Defendant is liable for the assault and battery.

Even though Defendant Akal and its employed security guards did not commit the actual assault and battery, they had a duty to protect the safety of the plaintiff in the detention center where persons such as Plaintiff relied upon them for security of their body and mind. Liability arose because of their failure and refusal to protect the Plaintiff, and its acquiescence and/or encouragement of the brutal attach on the plaintiff.

A prison official may be held liable under the Eighth Amendment for acting with "deliberate indifference" to inmate health or safety only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. *Farmer v. Brennan*, 511 U.S. 825 (1994).

Here, Defendant and/or its employees in the detention center clearly knew of the violent propensity of John Doe One, who had just engaged in a violent act; however, Defendant's employees released him to the general public without taking any reasonable measures of ensuring the safety of the plaintiff and the general public in the detention center from this individual; furthermore, Defendant deliberately failed to intervene in the vicious attack. Plaintiff cried out aloud for help; however, no guards showed during the several minutes' of brutal attack while normally the guards would respond to a similar situation within seconds.

Defendant argued that there was no allegation that "Akal or any employee of Akal was even present when the alleged attack took place" (Lines 18 and 19 of Page 6, Defendant's Motion). Plaintiff did not need to allege that Akal or its employees were present when the attack took place. All Plaintiff needed to do in the complaint and indeed has done so is to allege that Akal and/or its employees were not present to protect him while the attack took place.

Accordingly, Plaintiff has stated sufficient facts to state a claim upon which relief could be granted.

B. Plaintiff has stated extreme and outrageous conduct on the part of Defendant for Intentional Infliction of Emotional Distress ("IIED").

Under California law, the elements for the tort of intentional infliction of emotional distress are: 1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; 2) the plaintiff's suffering severe or extreme emotional distress; and 3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. *Christensen v. Superior Court*, 54 Cal.3d 868, 903 (1991). To be outrageous, the conduct must be so extreme as to exceed all bounds of that usually tolerated in a civilized society. Id. at 903.

Here in our case, Defendant had a duty to protect the safety of the plaintiff in its custody; however, Defendant deliberately and recklessly failed to protect him from the vicious attack from John Doe One who was known to have engaged in violent acts earlier during the day. The plaintiff suffered serious harm to his body and mind, and Defendant's failure and deliberate indifference to his safety is the actual and proximate causation of the emotional distress. Therefore, Plaintiff has stated sufficient facts for the Third Cause of Action for Intentional Infliction of Emotional Distress.

C. Plaintiff Has Stated Sufficient Facts to Satisfy the Legal Elements of Negligent Infliction of Emotional Distress

To bring a cause of action for negligent infliction of emotional distress, a plaintiff must prove: 1) that Defendant was negligent; 2) that plaintiff suffered serious emotional distress and 3) that Defendant's negligence was a substantial factor in causing the plaintiff's serious emotional distress. *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* 48 Cal.3d 583 (1989). Here, Paragraphs 8 through 15 laid out the facts to show that 1) Defendant was negligent in failure to protect the plaintiff from the vicious and brutal attacks from Defendant John Doe One; 2) that Plaintiff suffered serious bodily injuries and mental distress and 3) that Defendant's negligence in failure to protect him was a substantial factor in causing him the serious emotional distress. Again, the elements of negligent infliction of emotional distress were clearly met.

D. Plaintiff Has Stated A Claim in His Fifth Cause of Action for Racial and National Origin Discrimination

Again, Paragraphs 8 through 15, and 41 through 45 of the Complaint laid out facts for the Fifth Cause of Action for Racial and National Origin Discrimination.

Defendant argues that the law does not allow a federal detainee to recover for violations of his constitutional rights by employees of a private corporation, acting under the color of law. The Defendant cited *Correctional Services Corp. v. Malesko*, 534 U.S. at 63 and 66 and *Pollard v. Geo Group, Inc.*, 607 F. 3d 583 (2010). However, a careful reading of *Malesko* shows that *Malesko* does not categorically prohibit a private cause of action for violations of constitutional rights against federal agents as first recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), be extended to private corporations. The Court has extended at least twice to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for his harms caused by an individual officer's constitutional conduct. *Malesko*, *supra*. A careful reading of *Pollard* shows, contrary to the Defendant's argument, that the Ninth Circuit Court of Appeals actually allowed a *Biven* type of lawsuit to go forward against a private corporation acting under the color of federal law. *Pollard. supra*. Pollard, a federal inmate, appeals the district court's order dismissing his Eight Amendment claims against employees of a private corporation operating a federal prison under contract with the Bureau of Prisons. The Court specifically stated the following in its decision:

"This appeal presents the question of whether the implied damages action first recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971), allows a federal prisoner to recover for violations of his constitutional rights by employees of private corporations operating federal prisons. We conclude it does." *Pollard* at 585. To rule otherwise, all the federal government needs to do to escape liability for violations of constitutional rights of prisoners is to contract with private corporations to run the prisons. That's not what the *Bivens*'s Court contemplated and clearly against public policy.

E. Plaintiff Has Stated Sufficient Facts to Warrant the Award of Punitive Damages and Attorneys Fees

The complaint has stated sufficient facts for the award of punitive damages for the first four causes of action because of the intentional and reckless conduct of the defendant and for attorneys' fees for the fifth cause of action for racial and national origin discrimination.

F. Conclusion

For all the reasons stated above, Plaintiff respectfully requests that the Motion to Dismiss be overruled and dismissed as to all causes of action.

G. Alternative Request for Leave to Amend the Complaint

Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given. *Angie M. v. Sup. Ct.*, (Hiemstra) (1995) 37 CA 4th 1217, 1227, 44 CR2d 197, 204. Should the Court find any merits with Defendants' Motion to dismiss on any of the causes of action, Plaintiff respectfully requests that Plaintiff be allowed leave to amend the Complaint since he has not been given any opportunity to amend his Complaint.

Dated: January 9, 2011

Respectfully submitted.

______*/s/ Arthur J. Liu*______
ARTHUR J. LIU,
Attorney for Plaintiff
Rong Dong Li

CERTIFICATE OF SERVICE

I hereby certify that I served copies of the foregoing Plaintiff's Response in Opposition to Motion to Dismiss, Memorandum of Points and Authorities electronically through eFiling for Courts, January 10, 2011, for those so registered; for those not registered, copies were filed and served electronically and/or by U.S. Mail, first-class, postage prepaid.

______*/s/ Arthur J. Liu* ______
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